

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

JOSEPH MUNDY,	)	
	)	
Plaintiff,	)	No. 08 C 1576
	)	
vs.	)	
	)	
	)	
LIFE INSURANCE COMPANY OF NORTH AMERICA,	)	
In its capacity as Administrator of the	)	
Yellow Roadway Corporation Long-Term	)	
Disability Benefits Plan,	)	
YELLOW ROADWAY CORPORATION LONG-TERM	)	
DISABILITY BENEFITS PLAN,	)	
YELLOW TRANSPORTATION, INC.,	)	
	)	
Defendants.	)	

**PLAINTIFF'S AMENDED MOTION FOR LEAVE TO CONDUCT LIMITED  
DISCOVERY TO SUPPLEMENT THE ADMINISTRATIVE RECORD, REGARDING  
COUNT II OF THE SECOND AMENDED COMPLAINT**

1. Plaintiff was granted leave to file this amended motion.
2. Defendant, LINA, has filed the 'Administrative Record' in this matter.
3. Plaintiff and the Defendants to Count II do not agree on whether the proper standard of review in this case is 'deferential/arbitrary and capricious', or 'de novo'. Therefore, this motion shall include the Plaintiff's argument in that regard, and the Plaintiff shall then request limited discovery under both standards of review.

Standard of Review

4. It is the Plaintiff's position that the proper standard of review in this case is 'de novo' review. The "Group Policy" does not contain any language in regards to a deferential standard of review. (Exhibit A of the Second Amended Complaint) Although the "Group Insurance Certificate" does contain deferential review language in the first paragraph of Page 17 (Exhibit A of Defendant Yellow Transportation Inc.'s Motion to Dismiss, p. 17),

The "Group Insurance Certificate" states:

This is not the insurance contract. It does not waive or alter any of the terms of the Policy. If questions arise, the Policy will govern. You may examine the Policy at the office of the Policyholder or the Administrator.

Because the document refers to the Policy, but states that it is not part of the policy, the Defendants are not entitled to the deferential standard in regards to Count II. Schwartz v. Prudential Ins. Co. of America, 450 F.3d 697 (7<sup>th</sup> Cir., 2006) (the 7<sup>th</sup> Circuit found that where the deferential standard of review was not invoked in the plan, de novo review would apply, despite the fact that deferential review was included in the summary plan description). See also, Diaz v. Prudential Ins. Co. of America, 424 F.3d 635, (7<sup>th</sup> Cir., September 20, 2005), and Lauth

v. Prudential Insurance Company of America, 2006 WL 1302355

(N.D.Ill.)

If the prior argument is not sufficient to lead the court to a finding that the case is governed by 'de novo' review, the Plaintiff also points out that there is a question of fact in regards to the summary plan description. Although the affidavit attached to Yellow Transportation, Inc.'s Motion to Dismiss stated that the "Group Insurance Certificate" is "a true and accurate copy of the Summary Plan Description", the affidavit does not state that it was true and accurate as of January 5, 2005, the alleged date of disability in the Complaint, and the last page of the document is dated "03/2005". There is a question of fact in this regard that remains to be resolved. If the Summary Plan Description was issued after the Plaintiff's period of disability commenced, it is ineffective. Hackett v. Xerox Corp. Long-Term Disability Income Plan, 315 F.3d 771 (7<sup>th</sup> Cir. 2003)

Request for Limited Discovery

5. Plaintiff requests that the following additional information and documents be produced:

- A. The claims manual that governed the claims managers and other employees that investigated and made the decision to deny benefits.

- B. Any other internal rules, guidelines, and protocols referenced or relied upon in making the decision to deny benefits.
- C. Information and records regarding the business relationship between the doctors who reviewed the claim on behalf of LINA in both the Short Term Disability and Long Term Disability claims made by Mundy, including the nature of the employment or independent contractor relationship, the amount of compensation for this and other cases reviewed for LINA, the number of cases reviewed by each of the doctors on behalf of LINA, and the opinions reached by the doctors, either denying or granting said claims.

Argument for Limited Discovery  
if the Standard of Review is 'Arbitrary and Capricious'

6. Even if the court were to find that the standard of review is 'arbitrary and capricious', the Plaintiff seeks limited discovery. The Plaintiff is attempting to seek the information and documents because they may reasonably lead to evidence to show that LINA evidenced a conflict of interest, was arbitrary and capricious, and violated claims procedures when it denied the claim.

7. Although discovery in ERISA cases is normally limited to the Administrative Record, there are circumstances in which the courts will allow additional, limited discovery. Semian v. Life Insurance Company of North America, 436 F.3d 805, 813-816 (7<sup>th</sup> Cir., Feb., 2006) "By allowing limited discovery in cases where a prima facie showing of impropriety has been made,

district courts ensure that the 'arbitrary and capricious' standard of review is not toothless." Id. at 814.

8. "A claimant must demonstrate two factors before limited discovery becomes appropriate. First, a claimant must identify a specific conflict of interest or instance of misconduct. Second, a claimant must make a prima facie showing that there is good cause to believe limited discovery will reveal a procedural defect in the plan administrator's determination." Id. at 815, citing to, Bennett v. Unum Life Ins. Co. of Am., 321 F.Supp.2d 925, 932-33 (E.D. Tenn. 2004)

9. In this matter, the Life Insurance Company of North America is the insurer and the Administrator of the Plan, and therefore, there is a conflict of interest that should be considered by the Court as a 'factor'. Metropolitan Life Insurance Company v. Glenn, 128 S. Ct. 2343 (June 19, 2008); citing to Firestone Tire & Rubber Co. v. Bruch, 109 S.Ct. 948.

10. The good cause to believe that limited discovery will reveal a procedural defect in the plan administrator's decision to deny benefits is the fact that LINA appears to have bootstrapped its Long Term Disability Denial to the Short Term Disability denial. The following facts support the prima facie showing of good cause:

November 30, 2006	Mundy filed a claim for LTD benefits with LINA, but did not re-submit the extensive medical records submitted previously to the STD claims manager. (Exhibit A)
December 6, 2006	LINA summarily denied the claim for STD benefits after "Review of all the medical information in Mr. Mundy's short term disability file." (Exhibit B)
April 4, 2007	Mundy simultaneously requested reconsideration of the STD Denial, and appealed the LTD denial, with additional information, including the Fully Favorable Decision by the Social Security Administration and a new neuropsych exam. (Exhibit C)
April 10, 2007	Note in LINA's file that LINA received appeal on April 10, 2007. Person making note stated that STD claim was denied twice, and that the two doctors who had reviewed STD appeal were considered in LTD claim. (Exhibit D)
August 24, 2007	LINA issued a final denial of LTD benefits. (Exhibit E)

11. The Plaintiff asserts that the requested discovery will support the Plaintiff's argument to the Court that LINA's determination was flawed, was arbitrary and capricious, and violated claims procedures, in that its first Long Term Disability denial occurred only 6 days after the claim and was clearly a reiteration of the Short Term Disability denial. Furthermore, when reviewing its Long Term Disability denial,

LINA again relied upon the Short Term Disability denial, and its doctors, who were compensated by LINA to review the claim during the Short Term Disability process. The 'rubber-stamp' denial, based upon internal reviewing doctors, creates a circumstance that warrants further evaluation and investigation as to propriety.

Argument for Limited Discovery  
if the Standard of Review is De Novo

12. If the Court agrees that the standard of review is 'de novo', the Plaintiff continues to request leave to conduct limited discovery. The Plaintiff is attempting to seek the information and documents because they may reasonably lead to evidence to show that LINA evidenced a conflict of interest and violated claims procedures when it denied the claim, for the same reasons described in paragraphs 10 and 11 of this motion.

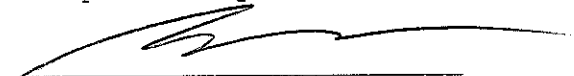
13. Where the standard of review is 'De Novo', the courts have allowed limited discovery. Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975, 981 - 982 (7<sup>th</sup> Cir., 1999). In ERISA cases, whether being reviewed under the deferential standard or the de novo standard, "'district courts enjoy broad discretion in controlling discovery.'" Semien v. Life Ins. Co. of North America, 436 F.3d 805, 813 (7th Cir.

2006) (quoting McCarthy v. Option One Mortgage Corp., 362 F.3d 1008, 1012 (7th Cir. 2004)).

14. The 'rubber-stamp' denial of Long Term Disability benefits creates discoverable issues that go beyond the administrative record in regards to the insurance company's internal policy and procedures used in this matter and in regards to the internal doctors that were used to deny both claims. The Plaintiff requests the above-described discovery in order to further evaluate and argue these issues. The discovery requested would not be overburdensome on the defendants.

WHEREFORE, the Plaintiff requests that he be granted leave to conduct limited discovery.

Respectfully submitted,



Attorney for Plaintiff

Kenneth P. Dobbs  
Roger S. Hutchison  
Dobbs and Hutchison  
47 West Polk Street  
Suite M-2  
Chicago, IL 60605  
312-461-9800



DOBBS & HUTCHISON  
Attorneys at Law

47 West Polk Street  
Dearborn Station, Suite M-2  
Chicago, Illinois 60605  
Tel: 312.461.9200  
Fax: 312.461.9008  
Toll Free: 866.651.7232

Frankfort Office By Appointment:  
112 West Kansas Street  
Frankfort, Illinois 60423  
Tel: 815.806.1500  
Fax: 312.461.9008

DEC 04 2006

November 30, 2006

CIGNA  
Attn: Charles Montabon  
Gateway View Plaza  
1600 West Carson Street, Suite 300  
Pittsburgh, PA 15219

Re: My Client: Joseph Mundy  
Plan Holder: Yellow Roadway Corporation

To Whom It May Concern:

Please find the attached:

Proof of Loss  
Disability Questionnaire  
Disclosure Authorization  
Reimbursement Agreement  
Birth Certificate  
Social Security Disability - Title II -  
notice of award with disability date of 1/5/05

Please note that the disability determination by SSA was not issued at the time that the second decision was made on the STD application.

Please send a letter of confirmation. Thank you for your attention to this matter.

Sincerely,

Roger S. Hutchison

RSH/ad  
Encl.



Joseph MUNDY  
LINA 00852

P250  
PO Box 22325  
Pittsburgh, PA 15222-0325

Phone: 800-238-2125 ext. 3229  
Fax: 412-402-3518



**CIGNA Group Insurance**  
Life · Accident · Disability

MR. ROGER HUTCHISON  
47 WEST POLK STREET  
SUITE M-2  
CHICAGO, IL 60605

December 6, 2006

Name: JOSEPH MUNDY  
Incident Number: 1509321  
Plan/Policy Number: FLK0980016  
Plan/Policy Holder: YELLOW ROADWAY CORP.  
Underwriting Company: Life Insurance Company of North America

DEAR MR. HUTCHISON,

This letter is regarding your Long Term Disability (LTD) claim. After completing our review of your claim, we are unable to approve your claim for benefits.

The contract defines disability as follows:

*"The Employee is considered Disabled if, solely because of Injury or Sickness, he or she is:*

- 1) unable to perform all the material duties of his or her Regular Occupation or a Qualified Alternative; and*
- 2) unable to earn 80% or more of his or her Covered Earnings from working in his or her Regular Occupation.*

*After Disability Benefits have been paid for 24 months, the Employee is considered Disabled if, solely due to Injury or Sickness, he or she is:*

- 1. unable to perform all the material duties of any occupation for which he or she is, or may reasonably become, qualified for based on education, training, or experience, and*
- 2. unable to earn 80% or more of his or her Indexed Earnings."*

We recently completed a review of the information on file. Specifically, this included:

-- Review of all the medical information in Mr. Mundy's short term disability file.

As you may know, Mr. Mundy short term disability claim was denied on 4/27/2005 as the medical did not support his inability to perform his sedentary occupation of Dispatcher. He appeal and the decision was re-affirmed on 6/29/2005. The second appeal sent by your office was reviewed and the decision was again re-affirmed on 4/25/2006.

To make a determination on Mr. Mundy's Long Term Disability claim, his file was sent for an independent review by a Board Certified Hematology/Oncology, Internal Medicine physician. The review was of the entire hard copy of the file, the deposition from Dr. Tess, multiple x-ray scans, consultation from a vascular specialist, neurologist and primary physician. The review indicated that Mr. Mundy has an episode of amaurosis Fugax on 1/5/2005, where he had temporary loss of vision in his right eye which resolved on its own in several minutes. A comprehensive work up was done and it was felt the Mr. Mundy had some degree of stenosis of his internal carotid arteries that did not require surgery. In addition, he had a single genetic abnormality in the area of Factor V Leiden deficiency. This was associated

December 6, 2006  
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with an activated protein C resistance. Mr. Mundy was treated with Plaxiv and aspirin. There is no evidence of progressive disease, recurrent thromboses, visual difficulties or need for carotid artery surgery. The evaluations regarding Mr. Mundy's cognitive and neurological functions indicate that he has anxiety and stress but no deficient neurological function and no evidence of significant cognitive dysfunction.

The result of the review is that the medical information does not support a condition that would prevent Mr. Mundy from performing his occupation of Dispatcher. At this time his claim has been closed and no benefits are payable.

If you disagree with our determination and intend to appeal this claim decision, you must submit a written appeal. This appeal must be received by us within 180 days of receipt of this letter and should be sent to the Life Insurance Company of North America representative signing this letter to the address noted on the letterhead.

You have the right to submit written comments as well as any new documentation you wish us to consider. If you have additional information, it must also be sent for further review to the address noted on this letterhead, within 180 days of receipt of this letter.

Additional information includes, but is not limited to: physician's office notes, hospital records, consultations, test result reports, therapy notes, physical and/or mental limitations, etc. These medical records should cover the period of January 10, 2005, through present.

You may also wish to have your physician(s) provide some or all of the following:

X-rays  
MRI's  
Consulting reports  
Neuro Evaluations

Under normal circumstances, you will be notified of a decision on your appeal within 45 days of the date your request for review is received. If there are special circumstances requiring delay, you will be notified of the reason for delay within 30 days of receipt of your request, and every 30 days thereafter. A final decision will be made no later than 90 days.

You have the right to bring a legal action for benefits under the Employee Retirement Income Security Act of 1974 (ERISA) section 502(a) following an adverse benefit determination on appeal.

Nothing contained in this letter should be construed as a waiver of any rights or defenses under the policy. This determination has been made in good faith and without prejudice under the terms and conditions of the contract, whether or not specifically mentioned herein. Should you have any information which would prove contrary to our findings, please submit it to us. We will be pleased to review any information you may wish to submit.

Please review your insurance booklet, certificate or coverage information available from your employer to determine if you are eligible for additional benefits.

Part 919 of the Rules and Regulations of the Illinois Department of Insurance requires that our company advise you that if you wish to take this matter up with the Illinois Department of Insurance, it maintains a Consumer Division in Chicago at:

100 W. Randolph St, Ste 15-100  
Chicago, IL 60601  
and in Springfield at:  
320 West Washington St.  
Springfield, IL 62767



December 6, 2006  
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Please contact our office at 800-238-2125 ext. 3229 should you have any questions.

Sincerely,

*Chuck Montabon*

Chuck Montabon, FLMI  
Disability Claim Manager



DOBBS & HUTCHISON  
*Attorneys at Law*

47 West Polk Street  
Dearborn Station, Suite M-2  
Chicago, Illinois 60605  
312.461.9200  
312.461.9008

*112 West Kansas Street*  
Frankfort, Illinois 60423  
815.806.1500  
12.461.9008

332-42-0465

*Joseph Mundy*

April 4, 2007

CIGNA  
Attn: Charles Montabon  
Gateway View Plaza  
1600 West Carson Street, S  
Pittsburgh, PA 15219

*Due Term*

CIGNA  
Kimberly Przybylek  
P. O. Box 22325  
Pittsburgh, PA 15222-0325  
(without Attachments)

Re: My Client: Joseph Mundy  
Plan Holder: Yellow Roadway Corporation

Dear Mr. Montabon and Ms. Przybylek:

Please find the attached:

Social Security Disability - Notice of Decision - Fully Favorable  
Dated June 27, 2006  
Social Security Disability - Title II -  
Notice of Award with disability date of 1/5/05  
Dated July 25, 2006  
Neuropsychological Evaluation - Alison J. Donnell, Ph.D.  
Dated June 13, 2006  
Social Security Administration - Complete File

This letter is written to request that the Short-Term Disability Denial be reconsidered based upon the evidence listed above, and as an appeal from the Denial of Long-Term Disability Benefits dated December 6, 2006. I have only enclosed attachments to Ms. Montabon, because it is my understanding that your company claims file was passed to him for evaluation of the LTD claim.



Joseph MUNDY  
LINA 00253

DOBBS & HUTCHISON  
*Attorneys at Law*

Page 2  
April 4, 2007

We stand on our argument made with the prior STD appeal and LTD claim, but additionally argue that the evidence above further supports my client's claim. Also, the LTD denial did not discuss the white matter disease found on the 1/13/05 MRI of Mr. Mundy's brain, and does not discuss the fact that Doctor Tess said he may be having small strokes and does not have blood going to his head because of 50% external carotoid artery blockage and 70% of internal blockage. Both the STD and LTD denials should be reconsidered based upon all of the evidence, including the neuro-psych exam, which evidences that Mr. Mundy is not able to work, not only because his doctor has ordered him to not subject himself to work stress, but also because he has cognitive deficits.

I look forward to your response.

Please send a letter of confirmation. Thank you for your attention to this matter.

Sincerely,

*Roger S. Hutchison*  
Roger S. Hutchison

RSH/ad  
Encl.



Joseph MUNDY  
LINA 00254

**Restrictions & Limitations****Subjective / Objective Findings / Treatment****Outstanding Issues and Follow-up Dates****Strategy**

4/10/07 received appeal for LTD from Attorney. STD was denied and two appeals denied. Attorney submitted LTD claim and that was also denied after peer review as Dr. Seifer and McCool had already reviewed STD appeal. Attorney has appeal LTD denial and sent in a stack of papers. I see two things that we did not have for original denial. A 3/10/05 letter to Dr. Tess from Dr. Paredes indicating clmt had positive activated protein C resistance and a 6/13/06 neuropsychological eval from Dr. Donnell. Will review with NCM to see if new med would reopen LTD.

4/12/07 -- per staffing medical not sufficient to reopen claim. Route to Appeals

<b>Last Changed User</b>	Charles Montabon	<b>Last Changed Date</b>	04/12/2007 03:04 PM
<b>Status:</b>	Completed	<b>Assigned To:</b>	Charles Montabon
		<b>Created:</b>	04/10/2007 04:17 PM



Joseph MUNDY  
LINA 00025

4/9/2008



**Lisa Lyle**  
Appeals Claim Manager



**CIGNA Group Insurance**  
Life · Accident · Disability

August 24, 2007

Routing P250  
PO Box 22325  
Pittsburgh, PA 15222  
Telephone 412.402.3353  
Facsimile 412.402.3222

Roger Hutchison  
47 West Polk Street  
Suite M-2  
Chicago, IL 60605

RE:    Claimant:                    Joseph Mundy  
      Policy Number:            FLK 0980016  
      Account:                    Yellow Roadway Corporation  
      Underwriting Company:    Life Insurance Company of North America

Dear Mr. Hutchison:

We have completed our review of Mr. Mundy's appeal for Long Term Disability benefits, and must regrettably inform you that we are affirming the previous denial of his claim.

Under the terms of his policy, in order for benefits to be payable we must have medical documentation supporting Disability. Disability is defined as follows:

"The Employee is considered Disabled if, solely because of Injury or Sickness, he or she is:

- 1) unable to perform all the material duties of his or her Regular Occupation or a Qualified Alternative; and
- 2) unable to earn 80% or more of his or her Covered Earnings from working in his or her Regular Occupation.

After Disability Benefits have been payable for 24 months, the Employee is considered Disabled if, solely due to Injury or Sickness, he or she is:

- 1) unable to perform all the material duties of any occupation for which he or she is, or may reasonably become, qualified for based on education, training or experience, and
- 2) unable to earn 80% or more of his or her Indexed Earnings."

The policy also contains an Elimination Period which is defined as:

"The Elimination Period is the period of time an Employee must be continuously Disabled before Disability Benefits are payable. The Elimination Period is shown in the Schedule of Benefits." It is shown in the Schedule of





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Benefits as 6 months and for this claim the Elimination Period was from January 5, 2005 through July 4, 2005.

Our records show that at the time Mr. Mundy ceased working on January 5, 2005, he was employed by Yellow Roadway Corporation as Dispatcher. This occupation is considered sedentary in nature.

His complete claim file, including any additional information submitted was reviewed in its entirety without deference to prior reviews. To ensure appropriate interpretation of the medical information, Independent Peer Reviews were completed by Dr. John P. Shallcross and Dr. R. Kevin Smith. Dr. Shallcross is a licensed clinical psychologist and Dr. Smith is Board Certified in Occupational and Environmental Medicine.

Dr. Shallcross reviewed the medical documentation on file and concluded it is not supportive of a global neurocognitive/functional impairment that would have precluded all work capacity. He advised the information leading up to the neuropsychological testing completed on June 13, 2006, is not convincing of a cognitive/functional impairment. He noted the mental status evaluations from a variety of providers are all entirely within normal limits. Also, Mr. Mundy saw a psychiatrist briefly in 2005, however, there is no indication that he had any psychotherapy, ongoing psychiatric medication management or counseling during this timeframe. Dr. Shallcross advised this is not consistent with a neurocognitive/functional impairment that would preclude all work capacity.

The review of the medical documentation by Dr. Smith also included a review of Dr. Shallcross' report. Dr. Smith advised that Mr. Mundy has been out of work since January 5, 2005 when he had sudden, painless loss of vision. This was subsequently diagnosed as amaurosis fugax. Dr. Smith noted Mr. Mundy had an extensive workup and was found to have fusiform dilatation of both carotid arteries and some evidence of stenosis of the mid basilar artery. Also, the cardiac workup was unremarkable. He did have a clotting factor abnormality. Based on the severity of Mr. Mundy's complaints, extensive workup and initiation of treatment he would have been unable to work from January 5, 2005 through only March 26, 2005 when the work up had been completed and treatment was initiated. Dr. Smith advised the records do not support Mr. Mundy's inability to function from March 27, 2005 from a physical perspective.

Although Mr. Mundy ceased working due to sudden vision loss and underwent extensive work up, restrictions beyond March 26, 2005, preventing the performance of his occupation are not supported. Neither the documentation regarding a physical or psychological condition is indicative of Mr. Mundy's inability to perform his occupation beyond March 26, 2005. A review of the medical information provided did not reveal a severity of his conditions which would preclude the performance of his own occupational duties throughout the Elimination Period and he did not continuously meet the definition of disability throughout this time. Therefore, we must affirm our previous decision to deny Long Term Disability benefits.

You or Mr. Mundy may request a review of this decision by writing to the Life Insurance Company of North America representative signing this letter at the address noted on the letterhead. The written request for review must be sent within 180 days of the receipt of this



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letter. In addition to any written comments, your request for review must include new documentation you wish us to consider.

This documentation includes, but is not limited to, physician's office notes, therapy notes, hospital records, consultation reports, test result reports and Independent Medical Exams. The information provided must support his inability to perform his occupation throughout the Elimination Period.


Under normal circumstances, you will be notified of a decision on the appeal within 45 days of the date your request for review is received. If there are special circumstances requiring delay, you will be notified of the reason for delay within 30 days of receipt of your request, and every 30 days thereafter. A final decision will be made no later than 90 days.

Please note that Mr. Mundy has a right to bring legal action regarding his claim under the ERISA section 502(a). Mr. Mundy and his plan may have other voluntary alternative dispute resolution options, such as mediation. One way to find out what may be available is to contact his local United States Department of Labor Office or his State Insurance Regulatory Agency.

Nothing contained in this letter should be construed as a waiver of any rights or defenses under the policy. This determination has been made in good faith and without prejudice under the terms and conditions of the contract, whether or not specifically mentioned herein.

Please review Mr. Mundy's insurance booklet, certificate or coverage information available from his employer to determine if he is eligible for additional benefits. Upon written request, you or Mr. Mundy may receive a copy of the claim file, free of charge.

Sincerely,



Lisa Lyle  
Appeals Claim Manager

